United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

NO. 77-4202

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, MERRIT GRAHAM LODGE NO. 1871,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Union violated Section 8(b)(1)(A) of the Act by imposing court-collectible fines on employees solely for the act of resigning from the Union during a strike.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C., Sec. 151, et seq.), for enforcement of its order issued on

August 30, 1977, against International Association of Machinists and Aerospace Workers, Merrit Graham Lodge No. 1871 (the "Union"). The Board's Decision and Order (A. 1-13)[1/] was issued by the full Board (Members Jenkins and Murphy dissenting) and is reported at 231 NLRB No. 74. This Court has jurisdiction over the proceedings, the unfair labor practices having occurred at Groton, Connecticut.

I. THE BOARD'S FINDINGS OF FACT

The facts in this case were stipulated by the parties and are as follows.

The Union had a collective-bargaining agreement with General Dynamics Corporation, Electric Boat Division (the "Company") which expired on June 30, 1975. A strike called by the Union began the following day. (A. 2; 15-16.) Twenty-six employees of the Company who had been members in good standing of the Union before the strike resigned from the Union and returned to work during the strike (A. 3; 16).

Since 1974 the constitution of the Union's parent body, the International Association of Machinists and Aerospace Workers, AFL-CIO ("I.A.M.") has prohibited, inter alia, the following conduct and made it subject to disciplinary charges:

1/ "A." references are to the portions of the record printed as an appendix to the parties' briefs. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

> Refusal or failure to perform any duty or obligation imposed by this Constitution; the established policies of the I.A.M.; the valid decisions and directives of any officer or officers thereof; or, the valid decisions of the E.C. or the G.L. convention.
>
> * * * * * * * * * *
>
> Accepting employment in any capacity in an establishment were a strike or lockout exists as recognized under this Constitution, without permission. Resignation shall not relieve a member of his obligation to refrain from accepting employment at the establishment for the duration of the strike or lockout if the resignation occurs during the period of the strike or lockout or within 14 days preceding its commencement. . . .
>
> * * * * * * * * *
>
> Any other conduct unbecoming a member of the I.A.M., provided, however, that any charge of such conduct shall specifically set forth the act or acts or omissions alleged to constitute such offense.

(A. 4; 15-16.)

After the strike was over the 26 employees who resigned from the Union were fined $500 each solely for resigning.[2/] The Union notified these employees of the imposition of the fines and that it intended to take legal action to collect them[3/] (A. 3; 24-25, 17).

2/ The orginal complaint in the Board proceeding alleged that the Union imposed the fines "for resigning from membership. . . and/or returning to work at the Company (A. 19-20). In the parties' amendment to their stipulation of facts, however, it was agreed that the $500 fines were imposed "solely" for the "acts of resignation," and that additional fines, imposed on some of the same employees for "other actions allegedly in violation to the IAMAW Constitution" are "not at issue in this proceeding" (A. 24-25).

3/ The record does not show whether any such actions has been undertaken.

II. THE BOARD'S CONCLUSION AND ORDER

On the basis of the foregoing facts, the Board (Members Jenkins and Murphy dissenting), found that the Union violated Section 8(b)(1)(A) of the Act by fining the 26 employees for the act of resigning (A. 5-6). The Board's order requires the Union to cease and desist from the unfair labor practices found and from "in any like or related manner" restraining or coercing employees in the exercise of their Section 7 rights (A. 7). Affirmatively, the order requires the Union to rescind the fines, refund any fines that may have been paid, with interest, and to post appropriate notices (A. 7-9; 13).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION VIOLATED SECTION 8(b)(1)(A) OF THE ACT BY IMPOSING COURT-COLLECTIBLE FINES ON EMPLOYEES SOLELY FOR THE ACT OF RESIGNING FROM THE UNION DURING A STRIKE

A. Controlling Principles

Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining and also "the right to refrain from any of all of such activities. . . ." Section 8(b)(1)(A) protects those rights by making it an unfair labor practice for a labor organization "to restrain or coerce. . . employees in the exercise of the rights guaranteed in Section 7 . . . ."

One of the well-established rights under the category of the right to refrain from concerted activities is the right to refrain from union membership (N.L.R.B. v. Drivers, Chauffeurs, Helpers, Local Union

No. 639, 362 U.S. 274, 279-280 (1960)), and its corollary, the right to resign membership in a union. N.L.R.B. v. Martin A. Gleason, Inc., 534 F. 2d 466, 476 (C.A. 2, 1976); Horwath v. N.L.R.B., 539 F. 2d 1093, 1097-1098 (C.A. 7, 1976) cert. denied, 430 U.S. 940; Marlin Rockwell Corp., 114 NLRB 553, 561-562 (1955). The right to resign, subject to any financial obligations due and owing, is in accord with the law "which normally is reflected in our free institutions." N.L.R.B. v. Granite State Joint Board, Textile Workers Union, 409 U.S. 213, 216-218 (1972).

The imposition of a court-collectible fine for the exercise of a Section 7 right violates Section 8(b)(1)(A). Booster Lodge No. 405, Int'l Ass'n of Machinists and Aerospace Workers v. N.L.R.B., 412 U.S. 84, 87-88 (1973). This principle applies, of course, to the exercise of the right to resign. As the Supreme Court has noted, a union may enforce its rules only against "members who are free to leave the union and escape the rule". N.L.R.B. v. Granite State Joint Board, supra, 409 U.S. at 216, quoting Scofield v. N.L.R.B., 394 U.S. 423, 430 (1969). Plainly, members are not free to leave if the very act of leaving results in discipline.

B. The Union Unlawfully Interfered with the Employees' Right to Resign

As shown in the Statement, the Union here stipulated that it fined its former members solely for the act of resigning. These facts constitute a prima facie violation Section 8(b)(1)(A). Booster Lodge No. 405 v. N.L.R.B., supra; N.L.R.B. v. Grantie State Joint Board, supra.

In this case the fines had the additional unlawful tendency to restrain and coerce employees in the exercise of their Section 7 right to refrain from striking following their resignation. See Booster Lodge No. 405 v. N.L.R.B., supra, 412 U.S. at 87-88.

The Union argued before the Board that the stipulated provisions of its constitution effectively and validly restricted these employees' right to resign: in effect, the Union agreed that the employees' continued membership in the Union following the Union's adoption of these constitutional provisions constituted a waiver of the employees' statutory right to resign. Although the Supreme Court has recognized the legitimate authority of a union to restrict, through a proper rule, the right of its members to refrain from striking (N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175 (1967)), it has expressly reserved the question of whether a union rule may ever limit an employee's right to resign. N.L.R.B. v. Granite State Joint Board, supra, 409 U.S. at 217; Booster Lodge No. 405 v. N.L.R.B., supra, 412 U.S. at 88. And the Court indicated that it would consider the validity of such a limitation only if the employees were clearly put on notice that their continued membership in the union would constitute a waiver of their right to resign. Booster Lodge No. 405, supra, 412 U.S. at 88. This accords with the fundamental principle that waiver of a statutory right, must be "clear and unmistakable"--"a mere inference, no matter how strong, [is] *** insufficient." N.L.R.B. v. Perkins Machine Co., 326 F. 2d 488, 489 (C.A. 1, 1964). Accord: Fafnir Bearing Co. v. N.L.R.B., 362 F. 2d 716, 722 (C.A. 2, 1966); N.L.R.B. v. Otis Elevator Co.,

208 F. 2d 176, 178 (C.A. 2, 1953); Texaco, Inc. v. N.L.R.B., 462 F. 2d 812, 815 (C.A. 3, 1972), cert. denied, 409 U.S. 1008; Timken Roller Bearing Co. v. N.L.R.B., 325 F. 2d 746, 751 (C.A. 6, 1963), cert. denied, 376 U.S. 971.

The Union is unable to show a waiver here because none of the constitutional provisions it relies on purport to place any restriction on the right to resign. The only provision that as much as mentions resignation merely establishes an "obligation to refrain from accepting employment" at a struck establishment following resignation (supra, p. 3). That provision hardly puts employees on notice that they may be disciplined for the act of resignation. On the contrary, by speaking in terms of a member's obligation after resignation, the provision implicitly recognizes the right to resign. Certainly it does not prohibit it. As the Board noted, a post-resignation obligation would be meaningless if resignation were not permitted (A. 5).

But even if the Union's interpretation of the provision as a restriction on resignation were a permissible interpretation, clearly it is not the only permissible one or one that presents itself unmistakably to the reader. In fact, "[n]othing in the record indicates that Union members were informed, prior to the bringing of the charges that were the basis of this action, that the provision was interpreted as" the Union contends it should be. Booster Lodge No. 405, supra, 412 U.S. at 89. Nor do the constitutional provisions regarding "[r]efusal or failure to perform any duty or obligation. . ." or "[a]ny other conduct

unbecoming a member . . ." (supra, p. 3) convey the impression that resignation is a punishable offense. Furthermore, there is no indication that members were informed that those provisions would be so interpreted. Indeed, there is no indication that the employees involved were even aware of these provisions. It can hardly be argued, therefore, that any members "clearly and unmistakably" waived their right to resign. Absent such waiver, the Union's discipline of the employees for exercising their protected right to resign clearly violated Section 8(b)(1)(A) of the Act.

Moreover, since there are no restrictions upon the right to resign in the instant case, it is unnecessary for this Court to determine the question, left open by the Supreme Court in Booster Lodge No. 405, of whether even a clear and unmistakable restriction on the right to resign could result in the employees' waiver of this fundamental statutory right. Similarly, since these employees were disciplined solely for resigning, this case does not raise the separate but related question of whether employees can waive the right to refrain from striking after resignation.[4/]

Before the Board, the Union made the additional argument that in unfair labor practice cases the Board and the courts cannot question the Union's assertion that the constitutional provisions restrict the right

4/ This latter issue is presented in N.L.R.B. v. Machinists Local 1327, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO, District Lodge 115 (No. 77-3723), pending before the United States Court of Appeals for the Ninth Circuit.

to resign. It is well established, however, that the Board and courts may review a union's interpretation of its internal rules where such an interpretation would erode Section 7 rights. N.L.R.B. v. Granite State Joint Board, supra, 409 U.S. at 217-218; Booster Lodge No. 405 v. N.L.R.B., supra, 412 U.S. at 88-90; Communications Workers of America, CIO v. N.L.R.B., 215 F. 2d 835, 838 (C.A. 2, 1954).

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should be entered enforcing the Board's order in full.

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January 1978.

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D.C.

this 27th day of January, 1978.